

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANCISCO JAVIER FIMBRES JR.,
Appellant.

No. 2 CA-CR 2015-0034
Filed December 21, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20130021001
The Honorable Scott Rash, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
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Counsel for Appellee

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STATE v. FIMBRES
Decision of the Court

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 Francisco Fimbres Jr. appeals from his convictions and sentences for multiple criminal charges arising from a burglary of an apartment. For the following reasons, we affirm.

Factual and Procedural Background

¶2 On December 25, 2012, at about 11:00 in the evening, C.H. heard noises outside his apartment. C.H. went outside to check on the family's car that they had recently purchased. When C.H. reentered the apartment, he was bloody and being followed by two men with guns. The two men held C.H., his wife K.M., and their three-year-old son at gunpoint while they stole some of the family's possessions. One of the men hit C.H. with a gun. The men took car keys and a Nintendo DS console.

¶3 Police arrived at the apartment complex on an unrelated matter, and the robbers fled on foot. Fimbres was captured. Police recovered cellular telephones and the Nintendo DS and returned them to the victims.

¶4 After a jury trial, Fimbres was convicted of first-degree burglary, kidnapping a minor under fifteen, aggravated assault of a minor under fifteen, and two counts each of kidnapping, armed robbery, aggravated robbery, and aggravated assault with a deadly weapon. He was sentenced to enhanced, concurrent prison terms, the longest of which were eighteen years. This appeal followed.

Closing Argument

¶5 During closing argument, Fimbres began to argue that an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), which had been given as to a cellular phone, also applied to a

STATE v. FIMBRES
Decision of the Court

Nintendo DS. The state objected, noting that the *Willits* instruction had only been granted as to the phone and not to the Nintendo console. Fimbres contended the instruction should apply to the console as well, an argument he had never previously made. The trial court refused to allow Fimbres to argue that the *Willits* instruction applied to the console.

¶6 On appeal, Fimbres claims the court's ruling limiting his closing argument "effectively prevented him from presenting a complete defense by precluding any argument relating [to] any other evidence where [the *Willits* instruction] might be applicable." We review a trial court's restrictions on closing argument for an abuse of discretion. See *State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985). Regardless of whether Fimbres would have been entitled to a *Willits* instruction on the console had it been properly requested, a court does not abuse its discretion in preventing a defendant from referring to a *Willits* instruction during closing argument when no such instruction has been requested or given for the item in question. Cf. *State v. Blackman*, 201 Ariz. 527, ¶ 59, 38 P.3d 1192, 1206 (App. 2002) (closing arguments may not comment on matters not in evidence). Accordingly, we conclude no error occurred.

Motion to Dismiss

¶7 Fimbres next argues the trial court's denial of his motion to dismiss was a denial of his right to due process pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988). Fimbres claimed one of the cellular phones recovered by police and returned to one of the victims actually belonged to him and contained exculpatory evidence. He filed a motion seeking its disclosure in the trial court, but the police were unable to locate it.

¶8 Fimbres claims the cellular phone belonging to him would have shown he made a phone call to someone named "Edgar" on the night in question. This, he asserts, would have corroborated his story that he was only at the apartment complex because Edgar insisted on stopping there while giving Fimbres a ride to the hospital to visit his wife and newborn child.

STATE v. FIMBRES
Decision of the Court

¶9 Fimbres does not assert that the evidence was lost in bad faith, but claims instead that the loss of the phone resulted in actual prejudice to his case. *See State v. Gerhardt*, 161 Ariz. 410, 412, 778 P.2d 1306, 1308 (App. 1989) (“Even in situations where the defendant cannot show bad faith on the part of the state . . . the defendant may nevertheless be entitled to a dismissal if he can make a sufficient showing of substantial prejudice.”). However, “[t]he mere possibility that destroyed evidence could have exculpated a defendant is insufficient to establish a due process violation.” *State v. O’Dell*, 202 Ariz. 453, ¶ 13, 46 P.3d 1074, 1079 (App. 2002).

¶10 Here, the only evidentiary value Fimbres claims for the lost phone is that it might have proved he made a phone call that evening. But to the extent Fimbres believes this evidence would have supported his account of why he was at the apartment that night, it is “at best, suggestive, not conclusive.” *State v. Torres*, 162 Ariz. 70, 76, 781 P.2d 47, 53 (App. 1989). Accordingly, we conclude the trial court did not err in denying Fimbres’s motion to dismiss.

Disposition

¶11 For the foregoing reasons, we affirm Fimbres’s convictions and sentences.